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26
27 **IN THE UNITED STATES DISTRICT COURT**
28 **FOR THE DISTRICT OF ARIZONA**

29 Kari Lake and Mark Finchem,
30 Plaintiffs,
31 vs.
32 Kathleen Hobbs, et al.,
33 Defendants.

34 No. 2:22-cv-00677-JJT

35 **MARICOPA COUNTY DEFENDANTS'**
36 **RESPONSE IN OPPOSITION TO**
37 **PLAINTIFFS' MOTION FOR**
38 **PRELIMINARY INJUNCTION**
39 **(DOC. 50)**

40 (Honorable John J. Tuchi)

41
42 Defendants Bill Gates, Clint Hickman, Jack Sellers, Thomas Galvin, and Steve

1 Gallardo in their official capacities as members of the Maricopa County Board of
 2 Supervisors (“the County”) respond to Plaintiffs’ Motion for Preliminary Injunction
 3 (“MPI”) (Doc. 50) by requesting that this Court deny it for the reasons set forth below.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 As set forth in the County’s previously filed Motion to Dismiss (“Cnty. MTD”) (Doc.
 6 27), Plaintiffs’ claims fail as a matter of law: (1) their claims are untimely, and so time-
 7 barred on several bases; (2) they allege insufficient facts; and (3) there is no legal or factual
 8 basis for their constitutional claims. Because Defendants have moved for dismissal pursuant
 9 to Rule 12(b)(6), the Court need not consider Plaintiffs’ untimely preliminary injunction
 10 request and instead should dismiss this case in its entirety.

11 Even if the Court considers Plaintiffs’ MPI, a cursory review reveals it is barred by
 12 the *Purcell* principle. *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). Contrary to
 13 Plaintiffs’ assertions, their requested relief requires a complete overhaul of Arizona’s
 14 elections procedures, from ballot printing to tabulation, and these changes, in the middle of
 15 the election cycle, will confuse voters and would be impossible for election officials to
 16 implement at this late date. (See Ex. 1, Declaration of Maricopa County Elections Director
 17 Scott Jarrett, ¶¶ 31-57.)

18 Further, there is no legal or factual basis to support the requested injunctive relief.
 19 See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (discussing elements for
 20 preliminary equitable relief); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35
 21 (9th Cir. 2011). Plaintiffs have no likelihood of success on the merits as set forth in the
 22 County’s MTD. Likewise, Plaintiffs’ alleged irreparable harm does not exist because there
 23 are adequate post-election remedies they may pursue if actual evidence demonstrates that
 24 illegal or fraudulent conduct impacted tabulation of the paper ballots cast in Arizona’s 2022
 25 General Election. Finally, the balance of equities and public interest tip in the government
 26 Defendants’ favor. Requiring the ballots cast in the 2022 General Election to be entirely
 27 hand counted, after using tabulation machines to count ballots in the 2022 Primary Election,
 28 would change the rules during the middle of an election cycle, inevitably confusing voters

1 and causing them to wonder whether their votes will be counted accurately. (Ex. 1, ¶¶ 31-
 2 40.) It will also require, among other things, vastly larger facilities for tabulation,
 3 exponentially more poll workers, substantial additional training, and massive public
 4 outreach, with little to no time to implement such changes. (*Id.*) All would come at great,
 5 unnecessary expense to taxpayers and directly contravene Arizona law that specifically
 6 authorizes machine counting of ballots. (*Id.*, ¶ 56.) Further, all of these problems are
 7 compounded by Plaintiffs' woefully dilatory conduct in requesting an injunction.

8 For these reasons, the County requests, to the extent this Court considers Plaintiffs'
 9 MPI, that it be denied.

10 **ARGUMENT**

11 **I. Arizonans Vote on Paper Ballots.**

12 The lengthy MPI and its remarkably voluminous attachments are riddled with the
 13 same fatal infirmities as Plaintiffs' First Amended Complaint ("FAC"). Most of the
 14 assertions are speculative, and those that are not are based on outdated, incorrect, or
 15 irrelevant information. Most inexcusable is Plaintiffs' continued false assertions that voters
 16 in Arizona do not vote on paper ballots. By written correspondence and twice
 17 telephonically during meet and confer, Defendants notified Plaintiffs' counsel of this fact,
 18 universally known by every voter in Arizona, including Plaintiffs. Yet this false assertion
 19 appears again, taxing finite judicial resources. In addition to the repeated statements to that
 20 effect in the FAC, the MPI asserts, "[e]xperience has now shown the move to computerized
 21 voting in Arizona was a mistake." (MPI at 2). This is false: there has been no move to
 22 computerized voting in Arizona." Rather, Arizonans vote on hand-marked paper ballots,
 23 not computers.¹ The MPI similarly claims, "[a] return to the tried-and-true paper ballots of

24
 25 ¹ The only exception is accessible voting devices made available for in-person voters who
 26 are blind or visually impaired. A.R.S. § 16-442.01. But accessible voting devices must
 27 produce a paper ballot or voter verifiable paper audit trail, which the voter can review to
 28 confirm that the machine correctly marked the voter's choices and which can be used to
 audit the election. A.R.S. § 16-446(B)(7); Elections Procedures Manual (2019) at 93. In the
 2020 General Election, 453 Maricopa County voters—out of 2,089,563 total Maricopa
 County Voters—marked their ballots using accessible voting devices. (Ex. 1, ¶¶ 24-26.)
 Thus, the total number of voters using accessible voting devices in Maricopa County

1 the past – and of the present, in countries like France, Taiwan, and Israel – is necessary.”
 2 (MPI, at 2). Again, false—Arizona voters have always voted and continue to vote on paper
 3 ballots; Arizona law requires it, and the state cannot “return to” what it has always done
 4 and is currently doing.

5 Even more problematic is that the testimony and evidence Plaintiffs cite in the FAC
 6 and MPI, to support their contention that computer ballot tabulation is unreliable, is
 7 primarily from a case addressing voting systems that do not use paper ballots or lack
 8 appropriate paper back up, unlike Arizona. This “evidence” taken out of context is
 9 misleading, at best. Specifically, Plaintiffs heavily rely on the ruling and testimony from
 10 *Curling v. Raffensperger*, 493 F. Supp. 3d 1264 (N.D. Ga. 2020), but hand counting ballots
 11 was never requested, addressed or at issue in that case. Rather, the *Curling* plaintiffs sought
 12 an injunction requiring the use of paper ballots for in-person voting in Georgia after the
 13 state moved *exclusively* to voting on Dominion Voting Systems’ Democracy Suite
 14 electronic ballot marking devices (“BMDs”) for all in-person voting. *Id.* at 1268–69. The
 15 concerns raised and the alleged vulnerabilities referenced in that case do not exist in
 16 Arizona, because (1) the vast majority of voters cast their votes on paper ballots without
 17 use of BMDs, *i.e.*, accessible voting devices (see footnote 1, *supra*); (2) Maricopa County
 18 is the *only* Arizona county to use Dominion Voting Systems’ Democracy Suite tabulation
 19 machines, but it uses a *different* version than that addressed in *Curling*; and (3) Maricopa
 20 County has enacted security protocols that address and counteract the vulnerabilities and
 21 concerns identified in *Curling*. (Ex. 1, ¶¶ 19, 24-30)

22 In fact, Professor J. Alex Halderman’s expert report in *Curling* states,
 23 the scientific evidence about voter verification shows that attackers who
 24 compromise the BMDs could likely change individual votes and even the winner of
 25 a close race without detection. Georgia **can eliminate or greatly mitigate these**
 26 **risks by adopting the same approach to voting that is practiced in most of the**
 27 **country: using hand-marked paper ballots and reserving BMDs for voters who**

27 represented a mere 0.02% of voters—the remainder hand marked their paper ballots. (*Id.*)
 28 The same format is followed in Arizona’s other counties, because of the requirements of
 Arizona law. (*Id.*, ¶ 23.)

1 **need or request them.** Absent security improvements such as this, it is my opinion
 2 that Georgia's voting system does not satisfy accepted security standards.

3 (Halderman Decl. 33, ECF # 1304-3, *Curling v. Raffensperger*, No. 1:17-CV-2989-AT
 4 (N.D. Ga. Feb. 3. 2022) (emphasis added)).

5 This is exactly what already occurs in Arizona. BMDs, *i.e.*, accessible voting
 6 devices, are available for voters who are blind or visually impaired, as required by both
 7 state and federal law. A.R.S. § 16-442.01; 52 U.S.C. § 21081(A)(3). Every other Arizona
 8 voter, whether they vote in-person or by mail, hand marks a paper ballot. Plaintiffs'
 9 selective use of quotes and expert testimony from *Curling* is misleading and inapposite -
 10 the issues addressed and relief requested in that case are not relevant to Arizona.

11 The same is true with respect to Plaintiffs' selective quoting from Professor
 12 Halderman's testimony to the Senate Select Committee on Intelligence - it blatantly
 13 misleads the court and public. In response to being asked what the "most important" things
 14 a secretary of state should do to protect their state's elections from attack, Halderman
 15 responded, "[t]he most important things are to make sure we have votes recorded on paper,
 16 paper ballots, which just cannot be changed in a cyber attack . . ." *Russian Interference*
 17 in the 2016 U.S. Elections at 91, S.Hrg. 115-92 (June 21, 2017) (MPI, Parker Decl., Exh.
 18 H). Halderman's testimony, again, addressed the lack of paper ballots, not a requirement
 19 that electronic tabulation be permanently banned.

20 Plaintiff's reliance on *Seeking the Source: Criminal Defendants' Constitutional*
 21 *Right to Source Code*, 17 Ohio St. Tech. L.J. 1, 35 (Dec. 2020), is similarly specious. (MPI
 22 at 8). The premise of that piece is entirely unrelated to election administration, yet Plaintiffs
 23 cite to partial anecdotal quotes. Worse, what they do not include is the following excerpt
 24 from the article's brief section discussing elections,

25 At first blush, a requirement for software independence might appear to
 26 preclude the use of any software (or computers) in elections altogether.
 27 But that is not necessarily the case. Software independence simply
 28 requires that any software-based system be designed in a way that allows
 29 for recovery of correct results even if the software has failed in some way.
 30 For example, a voting system that employs paper ballots (marked by a

1 voter) might perform an initial tally by computerized scanners, but still
 2 retain the ability to use the original paper ballots (which reflect the true
 3 intent of the voters) for recounts and audits

4 (See MPI, Ex. G, “Parker Decl.” (Doc. 42-1), at 37). Again, this describes exactly what
 5 already occurs in Arizona.

6 Finally, Plaintiffs’ reliance on the recently-released statement from the U.S.
 7 Cybersecurity and Infrastructure Agency (“CISA”) report is equally misleading. Although
 8 that report identified vulnerabilities related to the use of Dominion Voting Systems’
 9 Democracy Suite 5.5-A BMDs, it very clearly stated, “CISA has no evidence that these
 10 vulnerabilities have been exploited in any elections.” More importantly, it acknowledged
 11 that the available mitigation measures to address these vulnerabilities are “typically
 12 standard practice in jurisdictions where these devices are in use and can be enhanced to
 13 further guard against exploitation of these vulnerabilities.” CISA, ICS Advisory (ICSA-
 14 22-154-01), <https://www.cisa.gov/uscert/ics/advisories/icsa-22-154-01>. Plaintiffs
 15 conveniently fail to state this because, in fact, Maricopa County is the only Arizona county
 16 to use Dominion Voting Systems’ equipment; it uses a *different*, updated version of the
 17 Dominion Voting Systems’ BMDs (not the 5.5-A version); and the County has already
 18 implemented all of the recommendations that are necessary to provide security for the
 19 tabulation equipment. (Ex. 1, ¶¶ 27-30.)

20 The County agrees, as Plaintiffs assert, that “public confidence in the integrity of
 21 the electoral process has independent significance because it encourages participation in
 22 the democratic process.” (MPI at 33 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553
 23 U.S. 181, 197 (2008))). Indeed, Maricopa County, its elected officials, and dedicated
 24 election workers have spent the last nearly two years correcting the barrage of
 25 disinformation, like that asserted above by Plaintiffs, that has irresponsibly and without
 26 any factual basis sowed doubts about the reliability and trustworthiness of elections.
 27 Plaintiffs’ efforts to use the courts as a vehicle to further this false narrative is repugnant.
 28 As the court aptly stated in *Bowyer v. Ducey*, which alleged without basis, among other
 29 things, that software “DNA” used to “rig” elections in Venezuela is now used in U.S.

1 voting machines, “[a]llegations that find favor in the public sphere of gossip and innuendo
 2 cannot be a substitute for earnest pleadings and procedure in federal court.” 506 F. Supp.
 3d 699, 724 (D. Ariz. 2020).

4 **II. There is no basis for granting preliminary injunctive relief.**

5 **A. The *Purcell* Principle prohibits the grant of an injunction.**

6 As set forth in detail in the County’s MTD, the Supreme Court “has repeatedly
 7 emphasized that lower federal courts should ordinarily not alter the election rules on the eve
 8 of an election.” *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207
 9 (2020) (collecting cases); *Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018) (“[T]he
 10 Supreme Court has warned us many times to tread carefully where preliminary relief would
 11 disrupt a state voting system on the eve of an election.”); *see also New Georgia Project v.*
 12 *Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) (“And we are not on the eve of the
 13 election—we are in the middle of it, with absentee ballots already printed and mailed.”);
 14 *Purcell*, 549 U.S. 11 (staying a lower court order that changed election laws shortly before
 15 the election).

16 Here, Plaintiffs’ requested relief, including the bullet-pointed wish list contained in
 17 the FAC, would dramatically change all aspects of the election process. (FAC, ¶¶ 49-50,
 18 153.) Contrary to Plaintiffs’ assertions, *Purcell* and its progeny address both minimizing
 19 confusion to the voters **and** lessening the strain on election officials prompted by late
 20 changes to elections procedures. *See, e.g., Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081,
 21 1086 (9th Cir. 2020) (“And, as we rapidly approach the election, the public interest is well
 22 served by preserving Arizona’s existing election laws, rather than by sending the State
 23 scrambling to implement and to administer a new procedure for curing unsigned ballots at
 24 the eleventh hour.”).

25 Even if Plaintiffs were correct that preventing voter confusion is the only concern
 26 addressed by the *Purcell* principle, which it is not, Plaintiffs wrongly represent that banning
 27 electronic tabulation will not confuse voters because it only “affects the counting of the
 28 ballots.” (MPI, at 34). Indeed, as just one example, if the Court required hand counting of

1 ballots, all in-person voters in Maricopa County would place their ballots into ballot boxes
 2 instead of inserting them into onsite tabulators at polling locations as they are accustomed
 3 to doing. (Ex. 1, ¶¶ 31-34.) This noticeable change will be particularly troubling to in-person
 4 voters because the only ballots ordinarily placed in ballot boxes instead of onsite tabulators
 5 are provisional ballots and ballots that the tabulation machines cannot read, but which the
 6 voters decline to recast. (*Id.*, ¶ 34.) Voters consistently express doubt and concern about
 7 whether their ballots will be counted if they are treated as provisional. (*Id.*, ¶¶ 35-36.) This
 8 confusion will be further compounded by the fact that Plaintiffs' injunction would impact
 9 only the November General Election. So in-person voters would vote differently in the
 10 Primary and General Elections—elections that are within months of each other, within the
 11 same election cycle and with little to no time for communication and public outreach to
 12 explain the change. (*Id.*, ¶¶ 37-38.) Such a change and the confusion it would create would
 13 inevitably bring very long wait-times which would, in turn, lead to the disenfranchisement
 14 of Arizona voters whose jobs or personal circumstances do not allow them to wait for hours
 15 in line to vote. (*Id.*, ¶¶ 39-40.)

16 Likewise, the administration of the election would be profoundly negatively
 17 impacted if Arizona's counties were required to hand count the millions of ballots expected
 18 to be cast in the November 2022 General Election. First, hand counts are notoriously
 19 unreliable when compared to machine counts. (*See, e.g.*, Ex. 2, Stephen Ansolabehere *et*
 20 *al.*, *Learning from Recounts*, 17 Election L.J. 2, 100, 115 (2018) (stating, after conducting
 21 extensive analysis of computerized counts and hand counts of ballots in Wisconsin, “[w]e
 22 find . . . that vote counts originally conducted by computerized scanners were, on average,
 23 more accurate than votes that were originally tallied by hand”); Ex. 3, Stephen Goggin, *et*
 24 *al.*, *Post-Election Auditing: Effects of Procedure and Ballot Type on Manual Counting*
 25 *Accuracy, Efficiency, and Auditor Satisfaction and Confidence*, 11 Election L.J. 36, 42
 26 (2012) (noting that “hand-counted ballots generally have higher rates of adjustment upon
 27 recount” than do machine-counted ballots); *id.* at 50 (explaining that “even the most basic
 28 tasks performed by humans can and do introduce error into the process”)). This is not

1 surprising; “[c]omputers tend to be more accurate than humans in performing long, tedious,
 2 repetitive tasks.” (Ex. 2, *Learning from Recounts*, at 115.) And it is well-established that
 3 “[c]ounting paper ballots can be tedious, leading to vote-count errors.” (Ex. 4, National
 4 Academies of Sciences, Engineering, and Medicine, *Securing the Vote: Protecting*
 5 *American Democracy*, at 43 (2018).)

6 Second, beyond the innocent-type mistakes that can occur with hand counting
 7 ballots, there is the possibility of nefarious, intentional miscounts by bad actors who want
 8 to secure victory for their chosen candidates. (*Id.* at 94.)

9 Third, training workers to conduct hand counts takes significant time and resources.
 10 (Ex. 1, ¶¶ 41-42) More importantly, for Maricopa County to count all of its ballots by hand,
 11 some of which will contain up to 70 contests, would take a massive number of additional
 12 workers and physical space that would be impossible for the County to hire and procure in
 13 such a short period of time. (*Id.*, ¶¶ 43-57.) It is well-established that hand counting ballots
 14 takes significantly longer than machine counting does; thus, to count all the ballots by the
 15 deadlines set by Arizona law, a huge amount of poll workers will have to be hired. (*Id.*) As
 16 already explained by the County, the Cyber Ninjas counted only two contests (of 70 on each
 17 ballot) and spent millions of dollars doing so, yet it took them five months to accomplish
 18 even that limited task. (Cnty. MTD at 12; Ex. 1, ¶ 52.) Contrast that with the actual
 19 requirements of Arizona law, pursuant to which the County must canvass the election [*i.e.*,
 20 announce the final vote totals] “not more than twenty days following the election.” A.R.S.
 21 § 16-642(A). To accomplish the complete count within twenty days, *by hand*, would be a
 22 herculean task necessitating an extremely large number of persons to count the ballots. (Ex.
 23 1, ¶¶ 43-57.)

24 The County has struggled to hire sufficient poll workers to staff polling locations; it
 25 is extremely unlikely that it could secure the necessary poll workers to hand count all its
 26 ballots at the 2022 General Election. (*Id.*, ¶¶ 54-56.) Additionally, poll worker training has
 27 already started in Maricopa County, but this change would require different, additional
 28 training for the November General Election than the training workers receive for the August

1 Primary Election, further increasing the likelihood of confusion and error on the part of
 2 those workers. (Ex. 1, ¶ 43.)

3 For all these reasons, Plaintiffs' request for preliminary injunction must be denied.

4 **B. Plaintiffs cannot meet their burden for preliminary injunctive relief.**

5 A preliminary injunction is "an extraordinary and drastic remedy, one that should
 6 not be granted unless the movant, *by a clear showing*, carries the burden of persuasion."
 7 *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520
 8 U.S. 968, 972 (1997) (per curiam) (emphasis in original)); *see also Winter*, 555 U.S. at 24
 9 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right.")
 10 (citation omitted). A plaintiff seeking a preliminary injunction must show that (1) plaintiff
 11 is likely to succeed on the merits, (2) is likely to suffer irreparable harm without an
 12 injunction, (3) the balance of equities tips in plaintiff's favor, and (4) an injunction is in
 13 the public interest. *Winter*, 555 U.S. at 20. When the government is the opposing party, the
 14 third and fourth factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

15 Further, a mandatory injunction, such as the one Plaintiffs seek, is one that "orders
 16 a responsible party to 'take action.'" *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996).
 17 Such an injunction "'goes well beyond simply maintaining the status quo [p]endente lite
 18 [and] is particularly disfavored.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH &*
 19 *Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (alterations in original) (quoting *Anderson v. United*
 20 *States*, 612 F.2d 1112, 1114 (9th Cir. 1979)). Generally, mandatory injunctions "are not
 21 granted unless extreme or very serious damage will result and are not issued in doubtful
 22 cases." *Id.* at 879 (quoting *Anderson*, 612 F.2d at 1115).

23 As set forth below, Plaintiffs fail to meet any of the *Winter* elements to justify the
 24 grant of their requested mandatory injunctive relief.

25 **1. Success on the Merits.**

26 The County's MTD sets forth numerous reasons why Plaintiffs claims fail as a
 27 matter of law: (1) their claims are untimely on several bases; (2) they allege insufficient
 28 facts to state a plausible claim for relief; and (3) there is no legal or factual basis for their

1 constitutional claims. Because Plaintiffs' FAC should be dismissed in its entirety,
 2 Plaintiffs' request for preliminary injunction should, likewise, be denied.

3 **2. Irreparable Harm**

4 Plaintiffs' MPI also fails because they have not established that they are likely to
 5 suffer irreparable harm in the absence of an injunction. That failure bars any preliminary
 6 injunction. *Winter*, 555 U.S. at 20 (“A plaintiff seeking a preliminary injunction *must*
 7 establish . . . that he is likely to suffer irreparable harm in the absence of preliminary relief”)
 8 (emphasis added); *Am. Trucking Ass’ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir.
 9 2009)’ *see also* *Winter*, 555 U.S. at 21–22 (rejecting the “possibility” of harm standard, and
 10 holding that the Court’s “frequently reiterated standard *requires* plaintiffs seeking
 11 preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an
 12 injunction”) (first emphasis added). Here, Plaintiffs’ harm is entirely speculative. (*See* Cnty.
 13 MTD at 10–14 (discussing the conclusory nature of Plaintiffs’ allegations, most of which
 14 have nothing to do with Arizona, and the few of which that concern Arizona are entirely
 15 speculative).) Such conjectural harm does not satisfy *Winter*’s mandate that irreparable
 16 harm is *likely*.

17 As the *Winter* court explained, “[i]ssuing a preliminary injunction based only on a
 18 possibility of irreparable harm is inconsistent with our characterization of injunctive relief
 19 as an extraordinary remedy that may only be awarded upon a clear showing that the
 20 plaintiff is entitled to such relief.” 555 U.S. at 22. “Speculative injury does not constitute
 21 irreparable harm sufficient to warrant granting a preliminary injunction.” *Caribbean*
 22 *Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *see also* *Stormans, Inc.*
 23 *v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (“the district court need not consider public
 24 consequences that are highly speculative” (internal quotation marks and citation omitted)).
 25 “A plaintiff must do more than merely allege imminent harm sufficient to establish
 26 standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to
 27 preliminary injunctive relief.” *Caribbean Marine Servs.*, 844 F.2d at 674 When plaintiffs
 28 cannot demonstrate “imminent or likely” harms, an injunction should not issue. *Id.* at 675;

1 *see also Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994)
 2 (explaining that preliminary injunctions issue when there is evidence “of *certain* future
 3 harm . . . not just *speculative* harm”) (emphasis added).

4 Here, Plaintiffs have alleged nothing but speculative harm. They worry about such
 5 things as “phantom votes,” “large invisible risks,” and “manipulation of vote totals [that]
 6 ‘may’ occur.” (MPI at 33–34). Yet, these allegations are purely speculative and Plaintiffs
 7 put forth absolutely no evidence that any improper vote manipulation, hacking or other
 8 improper conduct has occurred in past Arizona elections or will occur in Arizona’s
 9 administration of its 2022 General Election. Indeed, of the MPI’s 35 pages, only six lines
 10 are actually dedicated to addressing the showing of the required, irreparable harm element.
 11 Further, and as addressed in detail above, because Arizona uses paper ballots, to the extent
 12 improper conduct occurs with respect to the tabulation of ballots, adequate post-election
 13 remedies already exist. In particular, A.R.S. § 16-672 specifies five grounds on which an
 14 election may be contested, three of which would allow for redress of the *potential* harms
 15 alleged by Plaintiffs. Specifically, A.R.S. § 16-672 states:

16 A. Any elector of the state may contest the election of any person
 17 declared elected to a state office, or declared nominated to a state office at
 18 a primary election, or the declared result of an initiated or referred
 19 measure, or a proposal to amend the Constitution of Arizona, or other
 question or proposal submitted to vote of the people, upon any of the
 following grounds:

20 1. For misconduct on the part of election boards or any members
 21 thereof in any of the counties of the state, or on the part of any officer
 22 making or participating in a canvass for a state election.

23 ...

24 4. On account of illegal votes.

25 5. That by reason of erroneous count of votes the person declared
 26 elected or the initiative or referred measure, or proposal to amend
 27 the constitution, or other question or proposal submitted, which has
 28 been declared carried, did not in fact receive the highest number of
 votes for the office or a sufficient number of votes to carry the
 measure, amendment, question or proposal.

1 Accordingly, if actual evidence exists that would support an allegation that votes
 2 were manipulated or improperly counted by a vote tabulation system, Plaintiffs may bring
 3 that claim and produce that evidence after the election. And, because paper ballots are used
 4 and then securely stored after tabulation in Arizona, the alleged problematic results can be
 5 recounted, if necessary. *See A.R.S. § 16-624(D)* (providing that “[i]f a recount is ordered
 6 or a contest begun within six months [following an election], the county treasurer may be
 7 ordered by the court to deliver to it the packages or envelopes containing the ballots” so
 8 that the recount can occur). As the Court is no doubt aware, Maricopa County successfully
 9 defended numerous challenges to its 2020 election results, including those containing
 10 allegations of improper manipulation of tabulation equipment, like those Plaintiffs
 11 speculate about in this action. No credible evidence existed, in any of those cases, to prove
 12 that the type of nefarious conduct Plaintiffs allege occurred.² Plaintiffs certainly offer no

13 ² The challenges brought in Maricopa County Superior Court included: *Aguilera v. Fontes*,
 14 No. CV2020-014083 (voluntarily dismissed, Nov. 7, 2020); *Donald J. Trump for President, Inc. v. Hobbs*, No. CV2020-014248 (Min. Entry Order, November 13, 2020 (after
 15 conducting evidentiary hearing, dismissing complaint with prejudice)); *Arizona Republican Party v. Fontes*, No. CV2020-014553 (Min. Entry Order, Nov. 18, 2020 (dismissing
 16 complaint with prejudice and ordering that Secretary of State, who had requested her fees,
 17 could file motion pursuant to A.R.S. § 12-349 (frivolous litigation statute)); *Aguilera v. Fontes II*, No. CV2020-014562 (Min. Entry, Nov. 29, 2020 (after conducting evidentiary
 18 hearing, “dismiss[ing] with prejudice for failing to state a claim upon which relief can be
 19 granted”; or alternatively, denying the relief sought by Plaintiffs given their failure to
 20 produce evidence demonstrating entitlement to same)); *Ward v. Jackson*, No. CV2020-
 21 015285 (Min. Entry Ruling, Dec. 4, 2020 (after conducting evidentiary hearing, denying
 22 requested relief and “confirming the election,” because court found that evidence did not
 23 show fraud, misconduct, illegal votes, or erroneous vote count), *affirmed* No. CV-20-0343-
 24 AP/EL (Ariz. S. Ct. Dec. 9, 2020) (“conclud[ing], unanimously, that . . . the challenge fails
 25 to present any evidence of ‘misconduct,’ ‘illegal votes’ or that the Biden Electors ‘did not
 26 in fact receive the highest number of votes for office,’ let alone establish any degree of fraud
 27 or a sufficient error rate that would undermine the certainty of the election results”).
 28 Additionally, an action was filed in this court. *Bowyer, v. Ducey*, No. CV-20-02321-PHX-
 DJH. It alleged fraud resulting from foreign interference in the election via offshore
 algorithms that somehow infiltrated Maricopa County’s vote tabulation equipment, leading
 to “injections” of votes for President-elect Biden, and ballot fraud. After reviewing the
 “evidence” submitted by the plaintiffs, Judge Humetewa dismissed the case. She ruled that
 the “Plaintiffs failed to provide the Court with factual support for their extraordinary
 claims[.]” 506 F. Supp. at 724. An additional challenge was filed in Pinal County Superior
 Court; the plaintiff raised the same claims as alleged by the plaintiffs in the federal court
 case, and it, too, was dismissed. *Burk v. Ducey*, No. S1100CV202001869 (Pinal Cnty. Sup.
 Ct. Dec. 15, 2020).

1 evidence to suggest that it will occur in the 2022 General Election.

2 Finally, in the instant action, the County will suffer irreparable harm if the Court
 3 grants Plaintiffs' proposed relief—not only because it will be forced to attempt to conduct
 4 a near-impossible (and perhaps actually impossible) hand count of all of its ballots, without
 5 sufficient time to prepare for doing so, but also because a state “suffers a form of
 6 irreparable injury” whenever it “is enjoined by a court from effectuating statutes enacted
 7 by representatives of its people.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (citations
 8 omitted). Here, Plaintiffs' proposed injunction would invalidate Arizona law that allows
 9 electronic tabulation of ballots. In asking the Court to effectively enjoin a law that has been
 10 policy in the State of Arizona since at least 1966, Plaintiffs would impose a significant,
 11 irreparable harm on Defendants, who are required to conduct elections consistent with
 12 Arizona law. *Democratic Nat'l Comm. v. Reagan*, No. CV-16-01065-PHX-DLR, 2018 WL
 13 2191664, at *8 (D. Ariz. May 10, 2018), *aff'd*, No. 18-15845, 2018 WL 4344291 (9th Cir.
 14 Sept. 12, 2018); *League of Women Voters of Ariz. v. Reagan*, 2018 WL 4467891, at *4 (D.
 15 Ariz. Sept. 18, 2018).

16 3. Balance of Equities and the Public Interest

17 To qualify for injunctive relief, Plaintiffs must establish that “the balance of equities
 18 tips in [their] favor.” *Stormans*, 586 F.3d at 1138 (quoting *Winter*, 555 U.S. at 20). In
 19 determining whether a movant has met this burden, courts have a “duty . . . to balance the
 20 interests of all parties and weigh the damages to each.” *Id.* (quoting *L.A. Mem'l Coliseum
 21 Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980)). Moreover, in
 22 cases involving elections, “[t]he public interest is significantly affected.” *Sw. Voter
 23 Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003).

24 As an initial matter, Plaintiffs' request for injunctive relief should be denied because
 25 of their inexplicable delay. While the doctrine of laches warrants dismissal of the FAC,
 26 Plaintiffs' dilatory conduct is even more consequential in the context of their request for
 27 preliminary injunction. Indeed, “a party requesting a preliminary injunction must generally
 28 show reasonable diligence.” *Benisek v. Lamone*, 585 U.S. —, 138 S. Ct. 1942, 1944

1 (2018); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). That is as true in
 2 election law cases as elsewhere. *See Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988)
 3 (Kennedy, J., in chambers); *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J.,
 4 in chambers). In *Benisek* the Supreme Court determined, in considering the balance of
 5 equities among the parties, “plaintiffs’ unnecessary, years-long delay in asking for
 6 preliminary injunctive relief weighed against their request.” 138 S. Ct. at 1944. There,
 7 plaintiffs waited six years, and three general elections, before pursuing their claims. *Id.*
 8 Here, Plaintiffs challenge a statutory scheme that has authorized counties to use vote
 9 tabulation machines to “automatically” count votes since at least 1966. (*See* Cnty. MTD,
 10 Ex. 14 (Doc. 29-15).) Plaintiffs allege problems with vote tabulation machines known since
 11 2002. (*See, e.g.*, FAC, ¶¶ 71–82.) Plaintiffs seek to invalidate a voting system certified by
 12 the Secretary on November 5, 2019. (*See id.*, ¶¶ 18, 137.) And Plaintiffs’ voter files indicate
 13 they each have voted in elections in which vote tabulation machines were used for more
 14 than a decade. (*See* Cnty. MTD, Ex. 15 (Doc. 29-16).)

15 Inexplicably, Plaintiffs’ dilatory conduct has persisted since filing the original
 16 complaint on April 22, 2022. First, they waited until May 4, 2022 to file their FAC—adding
 17 immaterial allegations and making cosmetic changes. (*See* Docs. 3, 4.) Worse yet, Plaintiffs
 18 then waited an additional five weeks after filing their FAC, and *after* Defendant Maricopa
 19 County moved to dismiss their Complaint, to file for their preliminary injunction. For these
 20 reasons, in addition to those addressed above with respect to the *Purcell* Principle, the
 21 balance of equities and the public interest will not be served by forcing all of the counties
 22 in Arizona to hand-count ballots in the 2022 General election.

23 For the foregoing reasons, this Court should deny Plaintiffs’ request for preliminary
 24 injunction.

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1 RESPECTFULLY SUBMITTED this 22nd day of June, 2022.
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4 THE BURGESS LAW GROUP
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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2022, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

/s/ Dana N. Troy